

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

May 31, 2011

The Honorable William G. Newchurch
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 502
Austin, Texas 78701

Re: Executive Director's Exceptions to the Administrative Law Judge's Proposed Order
TCEQ Docket No. 2008-1170-MLM-E; SOAH Docket No. 582-09-4949

Dear Judge Newchurch:

Enclosed is a true and correct copy of the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order (the "Exceptions").

The original of the Exceptions was filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality on this day.

Sincerely,

A handwritten signature in black ink, appearing to read "Laurencia N. Fasoyiro".

Laurencia N. Fasoyiro
Attorney
Litigation Division

Enclosure

cc: Mr. Randy Fairless, Attorney, 1456 First Colony Blvd., Sugar Land, Texas 77479
Blas Coy, Public Interest Counsel, MC 103

**SOAH DOCKET NO. 582-09-4949
TCEQ DOCKET NO. 2008-1170-MLM-E**

**EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Petitioner**

v.

**PETROLEUM WHOLESALE, LP
D/B/A SUNMART 363,
Respondent**

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

The Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ" or "Commission") files these Exceptions and proposed modifications to the Administrative Law Judge's ("ALJ's") Proposal for Decision ("PFD") and Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

I. Introduction

Petroleum Wholesale, LP d/b/a Sunmart 363 ("Respondent") owns and operates a chemical manufacturing plant located at 333 Lutchter Drive in Orange, Orange County, Texas (the "Facility"). The Facility has been historically designated by the TCEQ as a Leaking Petroleum Storage Tank ("LPST") site since 1997 after Respondent removed four of its Underground Storage Tanks ("USTs"). The Facility's Release Determination Report ("RDR") for the tank removal indicated hydrocarbon contamination, therefore, the Facility was issued a LPST number.¹ After the 1997 LPST designation, the Facility was again designated as a LPST site for a release that

¹ ED Ex. 4, Investigation Report # 595715, at bates page 000002. See also Testimony of Charmaine Costner, pages 25-28. ED Ex. 39, LPST ID Number Assignment and Corrective Action Requirements for Sunmart #363.

occurred from a UST system.² The Facility is located adjacent to waters of the state, which includes a ditch that feeds into a slough area that goes to Cypress Lake. Cypress Lake is located directly behind the Facility and drains into the Sabine River.

On April 1, 2009, the ED filed a Preliminary Report and Petition ("EDPRP") recommending that the Commission enter an enforcement order assessing an administrative penalty against and requiring certain actions of Respondent. On February 8, 2010, the ED filed his First Amended Report and Petition ("EDFARP") against Respondent. The ED alleged that during investigations conducted from July 2, 2007 to April 28, 2008 and on July 23, 2009, TCEQ Beaumont Regional Office investigators documented that Respondent violated specific statutes and Commission rules regarding underground storage tanks ("USTs"). The ED alleged that Respondent discharged waste into or adjacent to any water in the state, in violation of the Texas Water Code.³ The violations documented in the investigation reports include several previous spills, some documented by the City of Orange Fire Department ("the Fire Department") and the General Land Office ("GLO").⁴ Two previous investigations conducted on June 20, 2006 and January 22, 2007 were also incorporated into the investigation report.⁵

² 30 TEX. ADMIN. CODE § 334.2(115), "Underground storage tank system" is defined as an underground storage tank, all associated underground piping and underground ancillary equipment, spill and overfill prevention equipment, release detection equipment, corrosion protection system, secondary containment equipment (as applicable), and all other related systems and equipment

³ ED Ex. 5, EDFARP ¶ 6.

⁴ ED Ex. 4, Investigation Report # 595715, at Bates page 000002-000004.

⁵ ED Ex. 4, Investigation Report # 595715, at Bates page 000002-000004. The investigations were conducted by a TCEQ Emergency Response Coordinator, Gregory Goode.

II. Exceptions

The ED agrees with and supports the adoption of many of the ALJ's finding and conclusions. However, the ED disagrees with the ALJ's findings as discussed below:

Violations Nos. 1 and 2:

A. January 22, 2007:

The ED respectfully disagrees with the ALJ's conclusion that for penalty purposes the unauthorized discharge at the Facility on January 22, 2007 was an actual moderate rather than an actual major as classified by the ED. Second, the ED disagrees with the ALJ's conclusion that Respondent discharged approximately five gallons of product from the Facility rather than the 25 gallons of product alleged by the ED and that the discharge did not lead to the death of fish. Third, the ED disagrees with the ALJ's finding that Respondent did not fail to contain and immediately clean the spill of diesel. The evidence shows that on January, 22, 2007, there was an unauthorized discharge from the oil water separator at the Facility.⁶ As documented in the investigation report, on January 22, 2007 at 3:58 p.m., Jerry Ziller ("Chief Ziller"), Deputy Fire Chief, Orange Fire Department notified TCEQ's Beaumont Regional Office that approximately 100 gallons of diesel were discharged from the Facility into the storm water ditch.⁷ On January 23, 2007, the ED received an email communication from Chief Ziller to Mr. J.T. Ewing, General Land Office Region 1 Director, expressing concern about how the ditches and Cypress Lake area

⁶ED Ex. 4, Investigation Report # 595715, at Bates page 000003.

⁷ ED Ex. 4, Investigation Report # 595715, at Bates page 000003.

were impacted by the petroleum discharge from the Facility.⁸ He noted how the most recent incident (i.e. the January 22, 2007 unauthorized discharge) contributed to a sheen on Cypress Lake and how a previous unauthorized incident resulted in a fish kill.⁹ At the hearing, the ED introduced the photographs of the fish kill referenced in Chief Ziller's email.¹⁰ On January 24, 2007, TCEQ Emergency response investigator, Mr. Gregory Goode ("Mr. Goode"), conducted an investigation at the Facility in response to the January 22, 2007 spill. During the investigation, Mr. Goode observed several dead fish in Cypress Lake. The presence of the dead fish in the lake after the January 22, 2007 incident and the photographs of dead fish from a previous incident support the ED's position that the unauthorized discharge of petroleum product from the Facility resulted in the fish kill. During the January 24, 2007 investigation, Mr. Goode utilized a chemical classifier strip in Cypress Lake to check for the presence of petroleum product and the result confirmed the presence of petroleum product discharge.¹¹ At the time of the investigation, Respondent's employee, Mr. Allen Barron, informed Mr. Goode that he recovered 3,000 gallons of water with approximately five gallons of product.¹² Mr. Barron's recovery of five gallons of product does not disprove the ED's allegation and Chief Ziller's estimate of approximately 100 gallons of diesel discharged as a result of the spill. It merely shows that Mr. Barron was able to recover five gallons of the estimated 100 gallons of product, and that most of the product could have migrated further beyond the Facility before Mr. Barron's recovery effort. The fact that Mr. Goode observed

⁸ ED Ex. 30.

⁹ ED Ex. 30.

¹⁰ ED Ex. 31.

several dead fish in the lake during his January 24, 2007 investigation and the fact that the Fire Department estimated 100 gallons of product was discharged into the lake, all support the ED's recommendation that this violation should be classified as an actual major rather than an actual moderate. Also, the fact that there was still the presence of petroleum product in the lake on January 24, 2007, two days after the incident, supports the ED's allegation that Respondent failed to contain and immediately clean the spill. Therefore, The ED respectfully requests that the ALJ revise the PFD and find that the ten thousand dollars (\$10,000.00) penalty the ED is recommending for this violation is appropriate.

B. July 2, 2007:

The ED disagrees with the ALJ's finding that the ED failed to show that the Respondent's clean up was not completed within 24 hours, hence, the ALJ could not conclude that Respondent violated 30 TEX. ADMIN. CODE §§ 327.5(a) and 334.75(a)(1) and (b). The ED's evidence shows Respondent failed to contain and immediately clean the July 2, 2007 spill for the following reasons:

On July 2, 2007, Charmaine Costner ("Ms. Costner"), a TCEQ Beaumont Regional Office Investigator, conducted an investigation at the Facility, in response to this unauthorized discharge.¹³ The Fire Department observed a gasoline and flammable liquid spill at the Facility.¹⁴ They found at least 100 gallons of diesel mainly concentrated in the ditch in front of the Facility, which spread sheen over most of the concrete area of the Facility and downstream in the ditch and into the

¹¹ Mr. Goode's testimony, vol. 2, page 37, lines 19-20.

¹² ED Ex. 4, Investigation Report # 595715, at Bates page 000004.

¹³ ED Ex. 4, Investigation Report # 595715

nearby Cypress Lake.¹⁵ Several photographs of the incident show presence of diesel from the incident.¹⁶ Action Oil Services vacuumed approximately 3,000 gallons of diesel and water from the ditches and the waste water drains.¹⁷ On July 3, 2007, Ms. Costner returned to the Facility to review the areas affected by the spill and she observed that petroleum product continued to flow into the lake area.¹⁸ Ms. Costner informed Respondent that the spill would become a State Lead clean up, if there was no licensed hazardous material remediation company to clean up the spill.¹⁹ On July 4, 2007, Ms. Costner returned to the Facility and observed that diesel was still seeping out from under the slab into the utility easement, an indication that Respondent had failed to clean up the spill.²⁰ Diesel was coming into the ditch from the oil/water discharge pipe.²¹ The cleaning crew at the Facility, Milstead Environmental, informed Ms. Costner that approximately 16,000 gallons of oil/water mix had been pumped out of the separator in the last eight hours.²² When Ms. Costner returned to the Facility on July 5, 2007, she observed a dead alligator floating in Cypress Lake with product sheen still present on the lake and the bank areas.²³ Ms. Costner also observed product in the ditch and diesel product seeping from under the slab into the utility easement area.²⁴ The presence of diesel and

¹⁴ ED Ex. 10, City of Orange Incident Report dated July 2, 2007, at Bates page 000004-000005.

¹⁵ ED Ex. 10, City of Orange Incident Report dated July 2, 2007, at Bates page 000005. Ms. Costner's testimony, vol. 1, pages 51, lines 20-24.

¹⁶ ED Ex. 15, photographs of spill.

¹⁷ ED Ex. 4, Investigation Report # 595715, at Bates page 00005.

¹⁸ ED Ex. 4, Investigation Report # 595715, at Bates page 000005.

¹⁹ ED Ex. 4, Investigation Report # 595715, at Bates page 000005.

²⁰ ED Ex. 4, Investigation Report # 595715, at Bates page 000006.

²¹ ED Ex. 4, Investigation Report # 595715, at Bates page 000006.

²² ED Ex. 4, Investigation Report # 595715, at Bates page 000006.

²³ ED Ex. 4, Investigation Report # 595715, at Bates page 000006. See also ED Ex. 15, photographs of dead alligator, at Bates pages 000049-000050.

²⁴ ED Ex. 4, Investigation Report # 595715, at Bates page 000007.

lack of clean up of the spill as late as July 5, 2007, support the ED's allegation that Respondent did not contain and immediately clean the spill from the July 2, 2007 unauthorized discharge, as required by 30 TEX. ADMIN. CODE §§ 327.5(a) and 334.75(a)(1) and (b). Therefore, the ED respectfully requests the ALJ to reconsider his finding that the Respondent immediately cleaned up the spill.

C. July 27, 2007:

The ED disagrees with the ALJ's finding that Respondent did not fail to contain and immediately clean the spill of diesel on July 27, 2007, in violation of 30 TEX. ADMIN. CODE §§ 327.5(a) and 334.75(a)(1) and (b). On July 28, 2007, the Respondent submitted an incident report to the ED acknowledging that free product or sheen identified as diesel/fuel oil from the discharge impacted the soil.²⁵ While Respondent's report claimed that the petroleum product was contained on the property, it did not state that the spill was cleaned up as required by the rule.²⁶ According to the Report, product from the on-going spill floated out of the tank pit and across the parking lot.²⁷ On July 31, 2007, Chief Ziller contacted Ms. Costner to discuss the July 27, 2007 spill from the Facility. Chief Ziller stated that approximately five to six inches of water had accumulated on the surface of the parking lot with a visible sheen and was emitting a strong hydrocarbon odor.²⁸ The evidence showed that the Fire Department shut down the Facility and used barricades along with parameter tape to block off the entrance and exit of the

²⁵ Id. ED Ex. 12, Petroleum Wholesale Incident Report dated July 27, 2007.

²⁶ ED Ex. 12, Petroleum Wholesale Incident Report dated July 27, 2007

²⁷ Id. ED Ex. 12, Petroleum Wholesale Incident Report dated July 27, 2007.

²⁸ ED Ex. 4, Investigation Report # 595715, at Bates page 000008.

Facility because of the unauthorized discharge.²⁹ While the Fire Department found that "the owners of the business (Respondent) were on scene and are in the process of getting the problem solved," Respondent has not provided any evidence to show that the spill was immediately cleaned up.³⁰ There is no evidence to demonstrate that "Respondent began an extensive clean-up and remediation effort" to clean up the July 27, 2007 spill.³¹ The earliest indication of clean-up effort was on August 10, 2007, when Ms. Costner was informed that Respondent wanted to remove the lake boom in an effort to remove some water fauna growth within the boom area.³²

Violation Nos. 3 and 6: Failure to Investigate and Report a suspected release

The ED respectfully disagrees with the ALJ's finding that Respondent did not fail to investigate or report a suspected release within 30 days of discovery because Respondent had no reason to suspect a release. The ED determined that Respondent failed to investigate a suspected release within 30 days of discovery as required by 30 TEX. ADMIN. CODE § 334.74. Owners and operators of USTs are required to investigate suspected release at their facilities.³³ Commission rule describes several types of suspected releases which include when a monitoring result from a release detection method indicates a release may have occurred or when unusual operating conditions are observed by owners or operators.³⁴ At the time of the investigation, Respondent's inventory control records for August 2007

²⁹ Id. See also Ms. Costner's testimony, vol. 1, pages 54, lines 2-4.

³⁰ ED Ex. 13, at Bates page 000003.

³¹ See ALJ's comment, PFD, page 22.

³² ED Ex. 4, Investigation Report # 595715, at Bates page 000009.

³³ 30 TEX. ADMIN. CODE §334.74. Owners and operators of UST systems must report suspected releases to the agency within 24 hours and follow the procedures in 30 TEX. ADMIN. CODE §334.74. Owners or operators must immediately investigate and confirm all suspected releases of regulated substances.

indicated a shortage of more than 488 gallons of diesel and also 25 gallon increments of shortages at a time when the Facility was closed and not operating.³⁵ The fuel shortage constitutes a suspected release which the Respondent should have reported to the ED and also investigated.³⁶

The rule requires a suspected release to be reported within 24 hours of discovery and investigated within 30 days.³⁷ Respondent failed to report the suspected release within 24 hours and failed to investigate the suspected release within 30 days. In a letter to the ED dated February 11, 2008, six months after the suspected release, Respondent's Environmental Manager, Mr. Christopher Smith ("Mr. Smith"), attributed the loss of the 488 gallons of product to either water removal, evaporation, shrinkage due to cooler temperatures, or even theft.³⁸ Mr. Smith also attributed the shortage to pumping "small quantities of water (25 gallons) on several occasions and a large amount (approximately 500 gallons that showed as a 488 gallon drop August 10, 2007)."³⁹ Mr. Smith submitted an

³⁴ 30 TEX. ADMIN. CODE § 334.72(2) and (3).

³⁵ ED Ex. 17, at bates page 000005. Ms. Costner's testimony, vol. 1, pages 84, lines 5-14.

³⁶ 30 TEX. ADMIN. CODE § 334.72 spells out specific instances classified as "suspected release." Owners and operators of aboveground storage tank (AST) and underground storage tank (UST) systems must report to the agency within 24 hours (see §334.50(d)(9)(A)(v) of this title (relating to Release Detection) for reporting requirements associated with statistical inventory reconciliation inconclusive results), and follow the procedures in §334.74 of this title (relating to Release Investigation and Confirmation Steps) for any of the following conditions: (1) The discovery by owners and operators, or written notification by others to the owner or operator, of released regulated substances at the AST or UST site or in the surrounding area (such as the presence of non-aqueous phase liquids (NAPL) or vapors in soils, basements, sewer and utility lines, and nearby surface water); (2) Unusual operating conditions observed by owners or operators (such as the erratic behavior of product dispensing equipment that is consistent with or indicates a release, the sudden loss of product from the AST or UST system, or an unexplained presence of water in the tank), unless the system equipment is found to be defective but not leaking.

³⁷ 30 TEX. ADMIN. CODE §§ 327.3(a), 334.74, 334.72(1) and (2).

³⁸ ED Ex. 18, February 11, 2008 letter from Respondent to the TCEQ. The Respondent was required to report the suspected release within 24 hours of discovery. Also see Ms. Costner's Testimony, page 99, lines 14-25; page 100, lines 2-11.

³⁹ ED Ex. 18, February 11, 2008 letter from Respondent to the TCEQ.

unauthenticated document to the ED which indicated that MTI Environmental, LLC's ("MTI"), 80 barrel truck, removed diesel and water from a Mobil station in Orange, Texas on August 9, 2007.⁴⁰ Specifically, the MTI document stated that they "sucked up diesel and water out of a tank hold."⁴¹ "Tank hold" is a variation of the term "Tank hole," defined as the portion of the excavation zone at a UST facility which contains the tanks and associated backfill materials.⁴² By this definition, Respondent's MTI document indicates that diesel was found and removed from the backfill area surrounding a UST or USTs at the Facility. If that is the case, the presence of diesel free product in the tank hold immediately outside of a tank signifies that the tank may be leaking and Respondent should have suspected a release and followed the requirement that owners or operators must immediately investigate and confirm all suspected releases of regulated substances requiring reporting under 30 TEX. ADMIN. CODE § 334.72.⁴³

The MTI document did not account for the 488 gallon shortage at the Facility because there was no information in the document stating that 488 gallons of water or diesel were removed from the Facility as Respondent claimed. Despite several requests from the ED, Respondent has not provided any supporting documentation such as a waste manifest or hazardous waste determination record to support its claim that there was no suspected release that triggered reporting and investigation. At the hearing, Respondent still failed to provide any supporting documentation, evidence, witness or testimony to support its claim.

⁴⁰ Respondent's Ex. 2.

⁴¹ Respondent's Ex. 2.

⁴² 30 TEX. ADMIN. CODE § 334.2(108).

Further, the ED respectfully disagrees with the ALJ's position that the determination of a suspected release is subjective and that since Respondent did not suspect a release, it did not have to investigate or report a suspected release. To hold that a determination of whether a suspected release occurred is subjective would allow Respondents to disregard the reporting and investigation requirements under the guise of not suspecting a release. The inventory records indicating the 488 gallon shortage triggered a suspected release. So, at the very minimum Respondent was required to report the suspected release to the ED.

Assuming the Respondent did not suspect a release, it was still required to report the 488 gallons and 25 gallon shortages to the ED to determine if there was an actual release. Respondent's defense is solely based on an unauthenticated document that does not even identify the customer name or location of the Facility where the diesel was supposedly removed and does not make any mention of removal of 488 gallons of product.⁴⁴ Failure to report and explain the discrepancy in the report hinders the ability of ED's staff to determine whether or not there was an actual loss of diesel and whether such loss affects the human health or environment. Because the facility was closed when this shortage was indicated in the inventory control record, Respondent had to notify the ED of this unusual operating conditions and also conduct an investigation as to why and submit a report as to their findings and indicate whether any corrective action was conducted. The Respondent failed to do so. Therefore, the ED respectfully requests that the ALJ reconsider his finding that there was no suspected release and hold Respondent accountable for not

⁴³ 30 TEX. ADMIN. CODE § 334.74.

providing credible proof demonstrating that the 488 gallons of diesel shortage did not constitute a suspected release. At the minimum, the ED requests that the ALJ find that Respondent should have reported a suspected release to the ED. That way, ED's staff will have the information to determine if there was an actual release, particularly considering that this Facility is a designated LPST site with a long history of unauthorized releases.

The ED further disagrees with the ALJ's finding that no administrative penalty is warranted. Since there was a suspected release that was not reported or investigated, the ED recommends assessment of the recommended administrative penalty in the amount of fifty-three thousand five hundred forty-five dollars (\$53,545.00) for failure to investigate a suspected release and two thousand six hundred seventy-seven dollars (\$2,677.00) for failure to report a suspected release.

III. Other Suggested Modification

The ED suggests the following modification to the PFD:

Modify January 22, 2011 on page 5 of the PFD to January 22, 2007.

⁴⁴ Respondent's Ex. 2.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division



By _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2011, an original and seven (7) copies of the foregoing "Exceptions to Administrative Judge's Proposal for Decision" ("Exceptions") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.


I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via electronic mail to Blas Coy, Jr., Attorney, Office of the Public Interest Counsel, Texas Commission on Environmental Quality.

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via Certified Mail, Return Receipt Requested, Article No. 7009 1680 0002 2323 7501, and via electronic mail to:

Mr. Randy Fairless, Attorney
1456 First Colony Blvd.
Sugar Land, Texas 77479
rfairless@jandflaw.com

I further certify that on this day a true and correct copy of the foregoing Exceptions was E-filed to:

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William P. Clements Building
300 West 15th Street, Room 502
Austin, Texas 78701



Laurencia N. Fasoyiro
Attorney
Litigation Division
Texas Commission on Environmental Quality

SERVICE LIST

Petroleum Wholesale, LP d/b/a Sunmart 363
SOAH Docket No. 582-09-4949
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